UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

CHARLENE BENTON, President, on Behalf Of the EZRA PRENTICE HOMES TENANTS ASSOCIATION; COUNTY OF ALBANY; SIERRA CLUB; CENTER FOR BIOLOGICAL DIVERSITY; RIVERKEEPER, INC.; SCENIC HUDSON; NATURAL RESOURCES DEFENSE COUNCIL; and CATSKILL MOUNTAINKEEPER

Plaintiffs,

CASE NO. 1:16-CV-125 (GLS/CFH)

v.

GLOBAL COMPANIES LLC,

Defendant

THE DEFENDANT GLOBAL'S MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION TO DISMISS THE PLAINTIFFS' COMPLAINT

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TABLE OF ABBREVIATIONS

CAA	Clean Air Act
DEC	New York State Department of Environmental Conservation
ENB	Environmental Notice Bulletin
EPA	U.S. Environmental Protection Agency
FRCP	Federal Rules of Civil Procedure
LAER	Lowest achievable emission rate
NNSR	Nonattainment New Source Review
NSR	New Source Review
NYCRR	Official Compilation of Codes, Rules and Regulations of the State of New York
PSD	Prevention of Significant Deterioration
tpy	tons per year
VOC	Volatile organic compound

PRELIMINARY STATEMENT

Global Companies LLC ("Global") owns a petroleum terminal in Albany that stores and distributes various petroleum and related products via truck, barge and rail (the "Albany Terminal" or "facility"). More than three years ago, the New York State Department of Environmental Conservation ("DEC") modified Global's existing Clean Air Act ("CAA") Title V air permit to allow an increase in crude oil throughput at the Terminal. In granting the modification, DEC specifically found that the project would not require a preconstruction permit under the nonattainment New Source Review ("NNSR") program because federally enforceable limits on Global's operations would keep emission increases below applicability thresholds. In accordance with rules governing Title V permit modifications, DEC developed a draft permit, provided notice of its findings, and invited public comment. No public comments were filed. Then, as required by the CAA and State implementing regulations, DEC provided the proposed permit to the U.S. Environmental Protection Agency ("EPA"), which did not object. DEC then issued the permit, which was never challenged in the Court of Appeals for the Second Circuit, the designated forum for bringing such challenges.

Now, more than three years later, an amalgam of citizen groups opposed to crude oil transport have sued Global for undertaking the very activities authorized by DEC when it issued Global's modified Title V air permit. In their first and second claims, Plaintiffs allege that Global should have obtained a NNSR permit before expanding its crude oil handling activities and that Global should have complied with various requirements applicable under NNSR. As set forth in greater detail below, these claims represent an impermissible collateral attack on DEC's issuance of Global's Title V permit in 2012, and must be dismissed pursuant to Federal Rules of Civil

Procedure ("FRCP") 12(b)(1) for lack of subject matter jurisdiction. Plaintiffs are late, in the wrong forum, and are therefore barred from bringing the first and second claims.

Plaintiffs' third claim alleges that Global is violating a limit purportedly contained in its Title V permit on the volatility of crude oil handled at the Terminal. This claim must be dismissed under FRCP 12(b)(6) for failure to state a claim because the permit does not, in fact, contain the limit alleged by Plaintiffs. To the extent Plaintiffs' third claim can be construed as a challenge to the adequacy of Defendant's Title V permit, it is an impermissible collateral attack on the permit and must be dismissed for lack of jurisdiction.

STATEMENT OF FACTS[1]

Global's Albany Terminal is a 63-acre licensed, permitted and operational petroleum bulk storage and transfer terminal situated in an industrial and heavily commercial area of the City of Albany along and between Interstate I-787 and the Hudson River, adjacent to the heavily industrialized Port of Albany and across the river from the Port of Rensselaer. The Terminal—which has operated at its current location since the 1920s—consists of petroleum product storage tanks, along with truck, rail and marine loading and offloading facilities, for the storage, blending and distribution of crude oil, refined petroleum and related products.

Because the Albany Terminal emits more than 50 tons per year ("tpy") of volatile organic compounds ("VOCs") it is a "major source" of air pollutants under the CAA and is required to have a Title V operating permit, which incorporates into a single document all of the CAA requirements governing its operations. 6 NYCRR § 201-2.1(b)(21) (definition of "major

[1] When considering a motion to dismiss based on either lack of subject matter jurisdiction or failure to state a claim, the court can consider materials and documents that are intrinsic to and/or directly related to the pleadings, including documents referenced in or integral to the complaint. See pp. 11-12 infra. Accordingly, key documents are included as Exhibits to Global's Affirmation of Dean S. Sommer, Esq., dated February 26, 2016 ("Sommer Aff.").

source"); 201-6.1 (Title V applicability). As a "major source" of VOCs, the Albany Terminal also is required to obtain a NNSR permit if it undertakes any "modification" that will increase VOC emissions by 40 tpy or more. 6 NYCRR §§ 231-3.6 (permits); 231-6.1 (NNSR applicability to modifications at existing major sources). However, the Albany Terminal does not need a NNSR permit if it accepts federally enforceable conditions in its Title V permit that limit (i.e., "cap") project-related VOC emission increases to less than the 40 tpy significance threshold. 6 NYCRR § 201-1.1(b) (authorizing capping to avoid applicable requirements such as NNSR). Global accepted such conditions in its Title V permit.

In November 2011, Global submitted an application to DEC to modify its Title V permit for the Albany Terminal to increase the allowable annual throughput of crude oil, and to authorize the physical changes to the facility needed to implement the project. In drafting the Title V permit, DEC was aware that the proposed increase in crude oil throughput at the Albany Terminal could increase potential VOC emissions. Accordingly, the draft permit issued by DEC contained conditions designed to keep VOC emission increases below the 40 tpy threshold, and thus avoid the need for a NNSR permit. See Sommer Aff. Exh A; see also Sommer Aff. Exh. D, Permit Review Report, p. 4 of 29 (table identifying NNSR permit program as "non-applicable"). As required by its air permitting regulations, DEC published notice of the proposed modification to Global's Title V permit in the Environmental Notice Bulletin ("ENB") and provided for a 30-day public comment period. See Sommer Aff. Exh. B. The notice described the project and specified, among other things, that "The company recalculated their facility's emission profile using existing throughput caps, vapor control limits and emission netting to show that they are below the thresholds for applicability of 6 NYCRR 231-6 [the NNSR permitting rule]." Global also published notice of the draft permit modification in the Albany Times Union newspaper.

See Sommer Aff. Exh. C. In conjunction with the notices and draft permit, DEC made available a Permit Review Report summarizing the project/permit under review and identifying the applicable regulatory requirements. See Sommer Aff. Exh. D. Following the public comment period, the proposed permit was transmitted to EPA for review as required by the CAA and State implementing regulations. See Sommer Aff. Exh. E. No comments were submitted on the draft permit during the public comment period, and no one petitioned EPA to object to the proposed permit, which DEC issued in final form effective November 7, 2012. See Sommer Aff. Exh. F. The final permit consists of many dozens of individual permit conditions covering 124 pages, and includes limits on both emissions and product throughput but no numeric restrictions on the volatility of the crude oil that can be received at the Albany Terminal. No petition for judicial review of that final action was filed in the United States Court of Appeals.

After DEC issued the modified Title V permit to Global in December 2012, Global made substantial investments at the Terminal and began operating in accordance with the permit. Now, more than three years after the effective date of the modified Title V permit, and three years after the deadline for Plaintiffs to seek administrative or judicial review under the CAA and State regulations, Plaintiffs have filed a citizen enforcement case challenging the decisions made in the course of the DEC permitting process and alleging violations of Global's Title V permit.

CLEAN AIR ACT OVERVIEW[2]

All "major sources" under the CAA must obtain a Title V operating permit from the governing permitting authority, in this case, DEC. 42 U.S.C. §§ 7661-7661f. Added as part of the 1990 Amendments to the CAA,

> Title V instituted a centralized permitting program to be administered by the states subject to EPA oversight. Through the program, **all Clean Air Act substantive and procedural requirements applicable to a pollutant emitter are written in the emitter's operating permit**.... Each permit must include inspection, entry, monitoring, compliance certification, and reporting requirements to assure compliance with the Act.

Western States Petroleum Ass'n v. EPA, 87 F.3d 280, 282 (9th Cir. 1996) (emphasis added). Title V permits "do not generally impose any new emission limits, but are simply intended to incorporate into a single document all of the CAA requirements governing a facility." Sierra Club v. Otter Tail Power Co., 615 F.3d 1008, 1012 (8th Cir. 2010); see 57 Fed. Reg. 32250, 32251 (July 21, 1992). The CAA and EPA's implementing rules establish procedures requiring the permit to be developed with input from the applicant, the State's permitting authority, the permitting authorities of neighboring states, EPA and the general public. See 42 U.S.C. §§ 7661a(b), 7661d; 40 C.F.R. §§ 70.7 and 70.8. The end result of this review process is a comprehensive permit defining precisely what air pollution control requirements apply to a particular facility. Consistent with this scheme, the CAA specifically provides that "[c]ompliance with the terms of a Title V permit is deemed compliance with the Act." 42 U.S.C. § 7661c(f) (permit shield provision).

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[2] This section of the Memorandum of Law provides a brief overview of the provisions of the CAA relevant to this motion. For a more thorough description of the history, purpose, and key provisions of the CAA, we refer the Court to Romoland School District v. Inland Empire Energy Center, LLC, 548 F.3d 738, 740-43 (9th Cir. 2008) and United States v. EME Homer City Generation, L.P., 727 F.3d 274, 278-81 (3d Cir. 2013).

In addition to requiring Title V operating permits, the CAA requires owners/operators undertaking construction of a new major source or a significant modification at an existing major source to obtain a preconstruction permit under the NNSR program. 42 U.S.C. §§ 7502(b)(5) and 7503. If the project triggers NNSR, the applicant must obtain a preconstruction permit, comply with lowest achievable emission rate ("LAER") technology requirements, and offset emission increases from the project with emission reductions. Facilities such as the Albany Terminal that potentially trigger NNSR may instead accept permit conditions in their existing Title V permits that limit emissions from the project below the significant modification threshold and thereby avoid the requirement to obtain a NNSR permit.

Authority to implement both the Title V and NNSR programs in New York has been delegated to DEC. 40 C.F.R. § 52.1670. Both Title V and NNSR permits are processed pursuant to 6 NYCRR Part 201 (air permits and registrations)[3] and Part 621 (uniform procedures). See 6 NYCRR § 231-3.6(a) ("[p]ermit applications for proposed new and modified facilities subject to this Part [i.e., NNSR] will be processed in accordance with Parts 201 and 621 of this Title").

Facilities seeking a new Title V permit or a significant Title V permit modification must submit an application to the permitting authority for review and approval in accordance with the requirements of 6 NYCRR Parts 201 and 621. As part of that review process, DEC will assess whether the project triggers various applicable requirements, including NNSR, and decide with the permit applicant whether emission limits (i.e., "caps") to reduce potential facility emissions and avoid triggering NNSR or other CAA programs are necessary and/or appropriate. See 6 NYCRR § 201-1.1(b) (providing facility owners may "request limitations on [a] source's

[3] DEC has revised 6 NYCRR Part 201 since 2012, when Global received its Title V modification. This Memorandum of Law cites the version of 6 NYCRR Part 201 in effect when the permit was issued. See Sommer Aff. Exh. G for a copy of the 2012 regulations.

potential to emit regulated air pollutants . . . to avoid . . . applicable requirements," such as NNSR). DEC will then develop a draft permit and make it available for public notice and comment, publishing notice of the draft permit in both the ENB and in a general circulation newspaper, and preparing a Permit Review Report summarizing the project/permit under review and identifying the applicable regulatory requirements. 40 C.F.R. § 70.7(h)(4); 6 NYCRR §§ 621.7(a)(2), 621.7(b)(6)(iv), 621.7(c).

At the end of the public comment period, DEC prepares a proposed permit and transmits it to EPA for a 45-day review. 42 U.S.C. § 7661d(b); 40 C.F.R. § 70.8; 6 NYCRR § 201-6.3(c). If EPA fails to object, any person may petition EPA within 60 days of the end of EPA's 45-day review period to request that an objection be issued. If EPA denies the petition, the petitioner may seek judicial review under 42 U.S.C. § 7607. 42 U.S.C. § 7661d(b). Section 7607(b)(1) requires actions with local/regional implications, such as challenges to Title V permits, to be filed in the court of appeals for the appropriate circuit. This is the exclusive remedy available. Actions that could have been reviewed under § 7607(b)(1) "shall not be subject to judicial review in civil or criminal proceedings for enforcement. . . ." 42 U.S.C. § 7607(b)(2). In other words, challenges to EPA/State actions, such as the issuance of Title V permits, that could have been brought in the court of appeals pursuant to 42 U.S.C. § 7607(b)(1) may not later be collaterally attacked in civil or criminal enforcement actions in the district courts.

STANDARD OF REVIEW

As explained by this Court in Moss v. Moss, 2014 WL 4669302 at *3 (N.D.N.Y. 2014), "'[i]t is a fundamental precept that federal courts are courts of limited jurisdiction'" (quoting Owen Equipment & Erection Co. v. Kroger, 437 U.S. 365, 374, 98 S. Ct. 2396, 2403 (1978)). As such, "[a] case is properly dismissed for lack of subject matter jurisdiction under Rule 12(b)(1) when the district court lacks the statutory or constitutional power to adjudicate it." Makarova v. United States, 201 F.3d 110, 113 (2d Cir. 2000).

As the courts have repeatedly declared, the plaintiff, as "the party asserting subject matter jurisdiction, has the burden of proving, by a preponderance of the evidence, that the court has subject matter jurisdiction." Clarke v. United States, 107 F. Supp. 3d 238, 243 (E.D.N.Y. 2015) (internal quotations and citations omitted); see also Makarova, 201 F.3d at 113. In deciding a motion to dismiss for lack of subject matter jurisdiction, "the Court has the power and the obligation to consider matters outside the pleadings, such as affidavits, documents, and testimony, to determine whether jurisdiction exists." Aguilar v. Immigration & Customs Enforcement Div. of the U.S. Dept. of Homeland Sec., 811 F. Supp. 2d 803, 822 (S.D.N.Y. 2011) (citing Anglo–Iberia Underwriting Mgmt. Co. v. P.T. Jamsostek (Persero), 600 F.3d 171, 175 (2d Cir. 2010)); see J.S. ex rel. N.S. v. Attica Central Schools, 386 F.3d 107, 110 (2d Cir. 2004). In deciding jurisdictional questions, the court is limited to considering "competent evidence." Brown v. New York, 975 F. Supp. 2d 209, 221 (N.D.N.Y. 2013); see New York State Correctional Officers & Police Benevolent Ass'n v. State of New York, 911 F. Supp. 2d 111, 123 (N.D.N.Y. 2012). In the Second Circuit, "conclusory allegations [by the plaintiffs] are not sufficient to create a material issue of fact on the issue of jurisdiction." Zappia Middle East Const. Co. v. Emirate of Abu Dhabi, 215 F.3d 247, 253 (2d Cir. 2000) (citing Exchange Nat'l Bank v. Touche Ross & Co., 544 F.2d 1126 (2d Cir. 1976)).

With respect to motions to dismiss for failure to state a claim under FRCP 12(b)(6), FRCP 8(a)(2) requires that pleadings contain a "short and plain statement of the claim showing that the pleader is entitled to relief." As explained by the U.S. Supreme Court in Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 1949 (2007), "the pleading standard Rule 8 announces

… demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." Id. at 678 (citing Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955 (2007)). Any complaint "that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do'. . . Nor does a complaint suffice if it tenders 'naked assertion[s]' devoid of 'further factual enhancement.'" Iqbal, 556 U.S. at 678, 129 S. Ct. at 1949 (quoting Twombly, 550 U.S. at 555, 557, 127 S. Ct. at 1959, 1966); see Luna v. North Babylon Teacher's Organization, 11 F. Supp. 3d 396, 401 (E.D.N.Y. 2014) (citations omitted); Moss, 2014 WL 4669302 *5-6.

FRCP 8(a)(2) requires that pleadings "contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" Iqbal, 556 U.S. at 678, 129 S. Ct. at 1949 (quoting Twombly, 550 U.S. at 570, 127 S. Ct. at 1974). A claim has "facial plausibility" when the plaintiff "pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged" and "asks for more than a sheer possibility that a defendant has acted unlawfully." Iqbal, 556 U.S. at 678, 129 S. Ct. at 1949 (internal quotations and citations omitted) (quoting Twombly, 550 U.S. at 557, 127 S. Ct. at 1966).

Consistent with these principles, the Supreme Court laid out a two-pronged inquiry for Rule 12(b)(6) motions: first, "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice" and second, "only a complaint that states a plausible claim for relief survives a motion to dismiss." With respect to the second prong, where the complaint "does not permit the court to infer more than the mere possibility of misconduct," the motion to dismiss must be granted. Iqbal, 556 U.S. at 678-79, 129 S. Ct. at 1949 (internal citations omitted); see Haden v. Paterson, 594 F.3d 150, 161 (2d Cir. 2010) (citations omitted).

In resolving a Rule 12(b)(6) motion to dismiss, "courts may properly consider documents that are deemed included in, incorporated in, or integral to the complaint." Sira v. Morton, 380 F.3d 57, 67 (2d Cir. 2004). See Holmes v. Air Line Pilots Ass'n, Int'l, 745 F. Supp. 2d 176, 193 (E.D.N.Y. 2010); see also Moss, 2014 WL 4669302 *6. In considering such materials, "[i]f "these documents contradict the allegations of the ... complaint, the documents control and th[e] Court need not accept as true the allegations in the ... complaint.'" Vaughn v. Air Line Pilots Ass'n, Int'l, 395 B.R. 520, 540 (E.D.N.Y. 2008), aff'd, 604 F.3d 703 (2d Cir. 2010) (quoting Rapoport v. Asia Elecs. Holding Co., 88 F. Supp. 2d 179, 184 (S.D.N.Y. 2000)). Consistent with these basic principles, this Court can consider documents such as Global's permit, the DEC permit notices, and related materials in deciding whether Plaintiffs have stated a plausible claim for relief.

ARGUMENT

POINT I

PLAINTIFFS' FIRST AND SECOND CLAIMS ALLEGING A FAILURE TO OBTAIN A NNSR PERMIT, IMPLEMENT LAER, AND OBTAIN OFFSETS MUST BE DISMISSED UNDER FRCP 12(b)(1) FOR LACK OF SUBJECT MATTER JURISDICTION.

The Court must dismiss Plaintiffs' first and second claims for lack of subject matter jurisdiction because they each constitute an improper collateral attack on the Title V permit. As previously noted, 42 U.S.C. § 7607(b)(2) precludes any "judicial review in civil or criminal proceedings for enforcement" of matters—such as issuance of a Title V permit—that could have been raised by immediate judicial challenge under section 7607(b)(1). Such a judicial challenge may only be brought in the circuit court of appeals, here the Second Circuit, under 42 U.S.C. § 7607(b)(1). Section 7607 was Plaintiffs' exclusive remedy. This District Court therefore lacks subject matter jurisdiction over Plaintiffs' first and second claims. The Plaintiffs are late and in the wrong forum and are therefore barred from bringing this lawsuit.

A. Plaintiffs' Allegation that Global Failed to Obtain a NNSR Permit Constitutes an Improper Collateral Attack on Its Title V Permit Over Which the Court Lacks Subject Matter Jurisdiction.

Plaintiffs' first and second claims implicate the intersection between two key provisions of the CAA—the provisions for challenging CAA Title V permits, set forth at 42 U.S.C. §§ 7661d(b) and 7607, and the citizen suit provisions at 42 U.S.C. § 7604. Global submitted a Title V permit modification application to DEC seeking permission to increase its crude oil throughput in 2011. Between that time and November 2012 when DEC ultimately issued the 2012 permit modification, DEC reviewed the application, prepared a draft permit containing permit conditions designed to limit (i.e., "cap") emissions from the facility to avoid triggering NNSR, subjected the draft Title V permit with the emissions caps to public notice and comment, and submitted the proposed permit to EPA for review before issuing it, all in accordance with the CAA and State implementing regulations. Plaintiffs failed to timely comment on the draft permit during the DEC review process or submit objections to the proposed permit to EPA, and are now suing Global for not having the NNSR permit that DEC, after EPA review, specifically decided was unnecessary.

The circuit courts have consistently concluded that plaintiffs cannot collaterally challenge New Source Review ("NSR")[4] and other decisions made as part of a Title V permit review by bringing a citizen suit under 42 U.S.C. § 7604 because district courts lack subject matter jurisdiction. In Romoland School District v. Inland Empire Energy Center, LLC, 548 F.3d 738 (9th Cir. 2008), for example, the plaintiffs filed a citizen suit alleging that a permit authorizing construction of a new power plant violated key elements of the permitting authority's NSR regulations. After reviewing the relationship between the agency's preconstruction and Title V permitting programs, the Court of Appeals for the Ninth Circuit concluded that the two application processes had been consolidated into a single comprehensive Title V permitting system under both the federal and California regulations. Id. at 752-53. According to the court, because plaintiffs' suit amounted to a challenge to the terms of the permit itself (rather than defendant's compliance with the permit), the challenge should have been brought in the court of appeals at the time the permit was issued consistent with 42 U.S.C. §§ 7661d(b) and 7607, *not* as a citizen suit. After characterizing § 7607(b)(2) as a "use it or lose it" provision, the court went on to find that:

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[4] The NSR program has two components. The NNSR program applies to major sources of pollutants located in an area that does not meet (i.e., "attain") the national ambient air quality standards for that pollutant. 42 U.S.C. §§ 7502(b)(5), 7503. By comparison, the same facility located in an attainment area would be regulated under the Prevention of Significant Deterioration ("PSD") program. 42 U.S.C. §§ 7470-7479. For purposes of this brief, the term NNSR refers to the nonattainment New Source Review program specifically while the term NSR refers generically to both the NNSR and PSD programs.

> Judicial review through civil or criminal enforcement proceedings is unavailable whenever an individual "could have ... obtained" ... review [through a petition to the applicable appellate court]. **Thus, by creating in 42 U.S.C. § 7661d(b)(2) an avenue of judicial review that passes through 42 U.S.C. § 7607, Congress effectively foreclosed the alternative avenue of citizen suit enforcement through 42 U.S.C. § 7604.**

Id. at 756 (emphasis added). Ultimately, the court held that:

> [W]here a state or local pollution control district has integrated the preconstruction review requirements of Title I with the permitting requirements of Title V and a permit is issued under that integrated system, a claim that the terms of that permit are inconsistent with other requirements of the Clean Air Act may only be brought in accordance with the judicial review procedures authorized by Title V of that Act.... and may not be brought in federal district court under the Act's citizen suit provision.... **Because Plaintiffs' action was brought in an inappropriate forum under an inapplicable CAA provision in an untimely avenue of protest, the district court was without jurisdiction to hear it.**

Id. (emphasis added); see also Sierra Club v. Otter Tail Power Co., 615 F.3d 1008, 1020-24 (8th Cir. 2010) (concluding plaintiffs' citizen suit contending that defendant's Title V permit lacked key requirements under the New Source Performance Standards program amounted to an allegation that the permit "was not in compliance with the requirements of the CAA" and so could have been raised during the Title V permitting process); Texas Campaign for the Environment v. Lower Colorado River Auth., 2012 WL 1067211 * 9 (S.D. Tex. 2012) (dismissing citizen suit for lack of subject matter jurisdiction where plaintiff failed to challenge flexible permit that superseded emission limits contained in earlier construction permits at the time the flexible permit was issued, citing Otter Tail).

The Court of Appeals for the Third Circuit applied similar principles when it dismissed an EPA enforcement action for lack of subject matter jurisdiction pursuant to 42 U.S.C. § 7607(b) in United States v. EME Homer City Generation, L.P., 727 F.3d 274 (3d Cir. 2013). In that case, EPA alleged that a facially valid Title V permit issued to the current owners of a coal-fired power plant was inadequate because it omitted key NSR requirements. After undertaking a thorough review of the Title V permit review process and relevant case law, the court found:

> Congress created a "use it or lose it" provision for review of the EPA's failure to object to a proposed Title V permit. Romoland, 548 F.3d at 755. If review of the Administrator's decision not to object to a Title V application or permit "could have been obtained" through this process, then that challenge cannot be brought in an enforcement proceeding.

Id. at 297. According to the court, any of EPA's claims that either the permit application or the permit itself was deficient could have been pressed during the permit process and reviewed by the circuit court through the exclusive process established by Title V. As a result, 42 U.S.C. § 7607(b)(2) divested the district court of jurisdiction over EPA's collateral challenges to the permit. Id. at 300.

The courts have identified several public policy reasons supporting Congress' prohibition against collateral attacks on validly issued Title V permits. First, allowing collateral attacks could lead to simultaneous lawsuits by multiple parties raising the same or similar issues—for example, a direct permit challenge in the circuit court under 42 U.S.C. § 7607 and a separate CAA citizen suit under 42 U.S.C. § 7604. See, e.g., EME Homer City Generation, 727 F.3d at 299 ("'simultaneous suits by multiple parties raising the same or similar issues' would 'not only waste judicial resources, but could also result in inconsistent decisions.'") (citing Otter Tail, 615 F.3d at 1022); Romoland, 548 F.3d at 755. Second, "allow[ing] plaintiffs to raise issues resolved during the permitting process long after the process is complete would upset the reasonable expectations of facility operators and undermine the significant investment of regulatory resources made by state permitting agencies." Otter Tail, 615 F.3d at 1022; see also EME Homer City Generation, 727 F.3d at 299. To the extent a permit is later found to be deficient, "the proper avenue is for the EPA or states to reopen the permit to add any 'applicable requirement' that was omitted during the permitting process." EME Homer City Generation, 727 F.3d at 300 (citations omitted). See 40 C.F.R. § 70.7(f), (g); 6 NYCRR § 621.13 (agency-initiated permit modifications).

In their complaint, Plaintiffs aver that "[t]he Act's requirement for a major source to obtain and operate in compliance with a Title V permit is separate from and independent of the Act's NNSR permit requirement." Complaint, ¶ 41. As the court noted in Romoland, however, the NSR and Title V permit programs are inextricably linked under the CAA. Moreover, as was true of the California air permitting scheme discussed in Romoland, DEC's scheme also links the Title V and NNSR permitting programs. See, e.g., 6 NYCRR § 231-3.6(a) (specifying that permits for modified facilities subject to NSR will be processed in accordance with Part 201); 6

NYCRR § 201-1.1(b) (specifying that facility owners can request emission limits in their permits to avoid applicable requirements, including NSR). Under this scheme, Plaintiffs' opportunity to challenge Global's modification to its Title V permit arose during the Title V review process, and their current lawsuit is nothing more than an improper collateral attack on a permit that they do not like.[5]

The overriding importance of channeling permitting disputes involving major facilities through the Title V process and, eventually, into the court of appeals is illustrated by comparing the outcome in cases such as Romoland that involve Title V sources and those involving minor, non-Title V sources. In Weiler v. Chatham Forest Products, 392 F.3d 532 (2d Cir. 2004), the Court of Appeals for the Second Circuit concluded that DEC's decision to treat a facility as a minor source could be challenged in a § 7604 citizen suit. Unlike the present case, however, the facility in Weiler did not have a Title V permit. As a result, the modification did not trigger the prohibition against collateral attacks in 42 U.S.C. §§ 7661d(b) and 7607; in fact, § 7607 was not even mentioned in the decision. See also Northwest Environmental Defense Center v. Cascade Kelly Holdings LLC, 2015 WL 9581754 (D. Or. 2015) (in a citizen suit for failing to obtain a NSR permit, distinguishing between minor and Title V permits and, declaring that a "source with a validly-issued state permit subject to Title V requirements is not susceptible to citizen suits, regardless of whether the permit actually complies with CAA provision."). Id. *18.

[5] Plaintiffs devote several pages to arguing that Global failed to comply with DEC's Environmental Justice Policy (known as "CP-29"), purportedly depriving the residents of effective notice and an opportunity to comment. Complaint ¶¶ 55-60. However, neither the CAA nor New York's air permitting regulations require any type of special outreach and the document cited is DEC policy, not a regulation and is not enforceable by its own terms. DEC complied with the public notice and comment requirements of the CAA and State implementing regulations. No more was required. Moreover, consistent with 42 U.S.C. § 7607, the time for challenging the Title V permitting process has closed.

Plaintiffs' suit in this case constitutes precisely the type of improper collateral attack on a facially valid Title V permit barred by 42 U.S.C. § 7607(b) and condemned by the appellate courts. Global submitted a Title V permit modification application to DEC seeking permission to implement specific physical and operational changes that would allow it to increase its throughput of crude oil. DEC considered the air emissions implications of the proposed changes, established permit conditions to limit emissions of VOCs, and concluded that the project would not require a NNSR permit. After failing to comment on the draft Title V permit modification or submit objections to EPA, Plaintiffs commenced a citizen suit more than three years later, well after Global implemented the changes authorized by DEC. Plaintiffs' Complaint—which is premised on allegations that Global constructed a significant modification of a major source without a NNSR permit—collaterally attacks Global's valid Title V permit in violation of 42 U.S.C. § 7607(b). Because challenges to Title V permits are within the exclusive province of circuit courts under section 7607(b)(1), the Court lacks subject matter jurisdiction in this case, warranting dismissal in accordance with FRCP 12(b)(1).

B. Plaintiffs' Claim that Global Failed to Comply with LAER and Obtain Offsets Is Inextricably Linked to Its Claim that Global Failed to Obtain a NNSR Permit and So Must Suffer the Same Fate.

Plaintiff's second claim alleges that Global violated the CAA and New York's state implementation plan by operating the Albany Terminal without implementing LAER for VOCs and without obtaining emission offsets. For the reasons outlined in Section I.A. above, this claim also is an improper collateral attack on Global's Title V permit and must be dismissed pursuant to FRCP 12(b)(1) for lack of subject matter jurisdiction. The requirement to install LAER technologies and obtain emission offsets arises *only* if a facility is required to obtain a NNSR permit. These NNSR requirements are not enforceable independent of the permitting process. See Nucor Steel-Arkansas v. Big River Steel, LLC, 93 F. Supp. 3d 983, 990 (E.D. Ark. 2015) (citing Otter Tail, 615 F.3d at 1017). In this case, DEC determined that Global did not require a NNSR permit. If Global did not require a NNSR permit, it was not required to comply with the LAER and emission offset requirements of the NNSR program, and Plaintiffs' cause of action based on Global's alleged violation of these requirements must be dismissed as an improper collateral attack on Global's Title V permit.

POINT II

PLAINTIFFS' THIRD CLAIM ALLEGING THAT GLOBAL VIOLATED A LIMIT ON THE MAXIMUM VOLATILITY OF CRUDE OIL MUST BE DISMISSED UNDER FRCP 12(b)(6).

A. Global's Title V Permit Does Not Contain the Limit Global Allegedly Violated.

As discussed above, in resolving a Rule 12(b)(6) motion to dismiss, "courts may consider documents that are deemed included in, incorporated in, or integral to the complaint." Sira, 380 F.3d at 67. Where these documents contradict the complaint, the documents control and the court need not accept the allegations in the complaint as true. Vaughn, 395 B.R. at 540 (citations omitted).

Plaintiffs' third claim is premised on the unsupported allegation that "[t]he Title V Permit contains a federally enforceable throughput limitation under which the Albany Terminal may not receive, store, handle or marine load crude oil with an emission factor that exceeds 1.3590 pounds of VOCs per 1,000 gallons handled during marine loading" and that Global violated that emission factor by accepting so-called "Bakken" crude oil "with a VOC emission factor" exceeding that number. Complaint ¶¶ 85, 88.[6] Notably absent from the Complaint, however, is

[6] Plaintiffs' Complaint uses the terms "conventional crude oil" and "Bakken crude oil" in an attempt to create a distinction between lower volatility oil, which it argues Global purportedly used as the basis for emission estimates in the Title V permit modification application, and allegedly higher volatility oil from the Bakken shale region of North Dakota, which Plaintiffs' allege comprised the "majority" of the crude oil accepted by the Albany Terminal. However, the terms "conventional" and "Bakken" crude oil have no formal technical meaning and are not

a copy of the permit or a specific reference to the permit condition containing the alleged limit on crude oil volatility. This omission is understandable because Global's Title V permit—a copy of which has been provided to the Court as Exhibit F to the Affirmation of Dean Sommer—does not, in fact, contain this limit.

Plaintiffs attempt to get around the lack of any such permit provision by claiming that the permit somehow incorporated "representations" regarding the volatility of the crude oil by reference and transformed them into enforceable limits on the maximum volatility of crude oil that can be accepted at the Albany Terminal. Complaint ¶¶ 72, 88. However, neither the CAA nor New York's regulations call for the wholesale incorporation of information submitted with the permit application by reference. See 56 Fed. Reg. 21712, 21739 (May 10, 1991) (discussing relationship between permit and application in conjunction with draft Title V regulations). More important, the permit condition establishing a limit on crude oil throughput does not identify the emission factor singled out by Plaintiffs in the Complaint, let alone establish the emission factor as a limit on the maximum volatility of crude oil that can be accepted by the facility. See Sommer Aff., Exh. F, Permit Condition 4-7.

As set forth above, the entire purpose of Title V permits is to identify in a single document all of the conditions critical to compliance with otherwise applicable requirements. Western States Petroleum Ass'n v. EPA, supra, at 282. Nowhere in the permit's 124 pages is there a limit on the volatility of crude oil. Absent such a limit, Plaintiffs' third claim must be dismissed under FRCP 12(b)(6) for failing to state a claim.

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terms found anywhere in Global's Title V permit. The volatility of crude oil varies widely among oil formations generally, as well as within specific formations such as the Bakken shale.

B. To the Extent Plaintiffs' Seek to Enforce a Crude Oil Emission Factor Included in Global's Application, that Constitutes an Improper Collateral Attack on the Permit Over which the Court Lacks Jurisdiction for the Reasons Explained Above.

Plaintiffs' argument regarding the 1.3590 emission factor amounts to yet another improper collateral attack on Global's facially valid Title V permit. The emission factor was not included in the permit in any fashion, let alone identified as an enforceable limit on the maximum volatility of crude oil that can be accepted by the Albany Terminal. By now attempting to sue Global for not complying with a limit that is not in its permit, Plaintiffs are necessarily asserting that the 2012 permit is inadequate. Consistent with the discussion in Section I.A above, if Plaintiffs' wanted the emission factor of 1.3590 pounds of VOCs per 1,000 gallons handled to be an enforceable limit on the volatility of crude oil authorized at the Albany Terminal, they should have asked DEC to include such a condition in the permit during the public comment period. Having failed to do so, Plaintiffs cannot now sue Global in district court to enforce a number that is not part of the permit. As explained by the Court in EME Homer City Generation:

> Congress's decision not to authorize district-court actions for … validly issued but inadequate permits makes it unsurprising that § 7607 divests the district courts of jurisdiction over such collateral challenges. The thoroughness of the administrative review process . . . indicates Congress's contemplation that deficiencies in Title V applications and proposed permits would come to light and be corrected through this administrative process.

727 F.3d at 299. Plaintiffs had the opportunity to and should have addressed any perceived deficiencies in Global's Title V permit during the administrative review process. Having failed to do so, they cannot attempt to enforce their unsupported interpretation of the Title V permit against Global now.

C. Plaintiffs' Complaint Fails to Specifically Identify Any Alleged Violations of the VOC "Limit" in Global's Title V Permit.

Although the emission factor of 1.3590 pounds of VOCs per 1,000 gallons of crude oil handled is not in the permit, the Complaint would fail to state a claim under FRCP 12(b)(6) even if it were a limit because it does not allege Global's purported violations beyond "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements[.]" Iqbal, 556 U.S. at 678, 129 S. Ct. 1949. To survive a motion to dismiss "factual allegations must consist of more than mere labels, legal conclusions, or a 'formulaic recitation of the elements of a cause of action.'" Holmes, 745 F. Supp. 2d at 192 (citation omitted); see also Moss, 2014 WL 4669302 *5-6. Here, Plaintiffs' third claim alleges only that Global has "received, stored, handled, and marine loaded and continues to receive, store, handle and marine load Bakken crude oil at the Albany Terminal" and that "Bakken crude oil *generally* has an emission factor greater than 1.3590 pounds of VOCs per 1,000 gallons." Complaint ¶¶ 86, 87 (emphasis added). Applying the foregoing to the "plausibility" standard reiterated in Iqbal, these allegations can survive a motion to dismiss under FRCP 12(b)(6) only if they constitute "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged," i.e., violations of the 2012 permit. See Iqbal, 556 U.S. at 678, 129 S. Ct. at 1949 (internal quotations omitted) (quoting Twombly, 550 U.S. at 557, 127 S. Ct. at 1966. The allegations in this case fail because "[t]he plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." See Id. "Where there is an obvious alternative explanation that is more likely, the plaintiff's cause of action is not plausible and must be dismissed." Holmes, 745 F. Supp. 2d at 193 (internal quotes omitted) (quoting Iqbal, 556 U.S. at 682, 129 S. Ct. 1937); see Arar v. Ashcroft, 585 F.3d

559, 617 (2d Cir. 2009) (en banc) (allegations "become implausible when the court's commonsense credits far more likely inferences from the available fact.").

Reviewing Global's 2012 Title V permit—as the Court is permitted to do in deciding the 12(b)(6) motion—the 2012 permit does not prohibit Global from receiving, storing, handling, or marine loading "Bakken crude"; rather, the permit allows Global to receive, store, handle and marine load "crude oil". Further, there is no emission factor identified in the permit. Under the first prong of the Supreme Court's Iqbal inquiry, because Plaintiffs' allegations "are no more than conclusions, [they] are not entitled to the assumption of truth" under Iqbal. 556 U.S. at 678. Employing the second-prong of the Iqbal inquiry, and reviewing the remaining allegations in context, the third claim "do[es] not permit the court to infer more than [the] mere possibility of misconduct" and therefore fails to state a claim under FRCP 12(b)(6). Id. at 679. The "obvious alternative explanation" to Plaintiffs' conclusory allegations is that Global has "received, stored, handled, and marine loaded and continues to receive, store, handle and marine load Bakken crude oil at the Albany Terminal" in accordance with and in the manner allowed by Global's 2012 permit.

CONCLUSION

For the reasons set forth above, the Plaintiffs' first and second claims are being raised too late and in the wrong forum, depriving this Court of subject matter jurisdiction. Plaintiffs' third claim does not survive a review of the plain language of Global's Title V permit. Global therefore respectfully requests that the Plaintiffs' Complaint be dismissed in its entirety pursuant to FRCP 12(b)(1) and 12(b)(6), and that the Court further award Global such other and further relief deemed just and proper, including equitable relief, costs, fees and disbursements.

Respectfully Submitted,

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YOUNG / SOMMER LLC

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